IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.963 of 2007

Kotak Mahindra Bank Ltd. Appellant
Vs.
Mr.Bharat S. Dahanukar & ors. Respondents

Mrs.Revati Mohite-Dere for appellant.
Mr.A.S.Shitole, APP for State.

CORAM: B.H.MARLAPALLE, J.

Reserved on: October 16, 2007.
Pronounced on: December 20, 2007.

JUDGMENT:

1. Pursuant to the order passed on 29/9/2007 this appeal has been heard along with Criminal Application No.2263 of 2006 filed for seeking leave to appeal under Section 378(4) of Cr.P.C. R. & P. has been perused and the appeal arises from an order of acquittal passed by the learned Metropolitan Magistrate, 12th Court, Bandra against accused nos.3 and 5 on 23/2/2006 in C.C. No.480/SS/2005 (Old C.C.No.316/S/1997) filed under Section 138 of the Negotiable Instruments Act, 1881 (for short "the Act"). By the said order the learned Metropolitan Magistrate was pleased to allow the complaint partly and accused nos.1 and 2 have been convicted and

sentenced under Section 138 read with Section 141 of the Act. Thus the scope of the appeal is only for consideration against accused nos.3 and 5 who have been acquitted.

2. Six cheques with the following particulars were issued by the accused no.1 - company in favour of the complainant - company :

Sr.No.	Cheque no.	Payable Date	Amount (Rs)
1.	044184	1/1/1997	2,33,191/-
2.	044185	1/2/1997	2,33,191/-
3.	044186	1/3/1997	2,33,191/-
4.	044187	1/4/1997	2,33,191/-
5.	044188	1/5/1997	2,33,191/-
6.	044189	1/6/1997	2,33,191/-

. On 20/6/1997 the complainant - company presented these cheques for encashment with its Bank i.e. HDFC Bank, Khar Branch, Mumbai but they were returned unpaid by the drawee Bank for the closure of

the account as per the memo dated 23/6/1997. The complainant sent the statutory demand notice on 8/7/1997 and inspite of service of the same when the accused did not pay the cheque amount, the complainant - company filed the above stated complaint. As per the complainant it was initially named as Kotak Mahindra Finance Co. Ltd. and subsequently it became a Bank i.e. Kotak Mahindra Bank Ltd. It was in the business of giving on lease capital, equipments like machines etc. and as per the agreement dated 4/3/1994 it supplied plant and machinery to the accused no.1 - company worth about Rs.one crore and on lease basis. Lease amount was agreed at Rs.2,33,191/- and accordingly the above stated cheques were issued which could not be encashed.

3. Accused no.1 is a public limited company and seven of its Directors were initially impleaded as accused nos.2 to 8. However accused no.6 - Shri Ramdas Thakkar came to be deleted as per the order passed by this Court on 7/11/1997. Accused no.7 was deleted on 2/7/1997 and accused nos.4 and 8 came to be deleted on 11/10/2002 by the complainant - Bank and the complaint thus survived against accused no.1 - company and accused nos.2, 3 and 5.

4. Admittedly the dishonoured cheques were signed by the accused no.2 who has been found guilty along with accused no.1 - company. The learned Metropolitan Magistrate acquitted accused nos.3 and 5 on the ground that there was no material to hold that they were responsible for and in charge of the day to day affairs of the accused no.1 - company. The trial Court also noted that accused no.8 was a full time Director of the accused no.1 at the relevant time and he was dropped by the complainant - Bank on 11/10/2002.

5. Hence the only issue for consideration in this appeal is whether the Trial Court's order dated 23/2/2006 acquitting the accused nos.3 and 5 in C.C. No.480/SS/2005 is supported by the evidence on record and there is any case made out by the complaint to hold the accused vicariously guilty along with the company and accused no.2.

6. Initially the complaint was filed on behalf of the complainant - company by Shri Bandish Dixit and subsequently Shri Tushar Bhalchandra Patel, working as a Manager of the complainant-Bank appeared in the

witness box in support of the complaint. By way of examination-in-chief he filed an affidavit and he was cross-examined thereon. Whereas on behalf of the remaining accused, accused no.2 stepped in the witness box. Balance sheets for three financial years i.e. 1992-93, 1993-94 and 1994-95 were brought on record. However, the balance-sheet for the year 1995-96 was not placed on record by the complainant - company.

7. Though in the complaint it was stated that all the accused - Directors i.e. accused nos. 2 to 8 were in-charge of and responsible for the day to day activities and the management of accused no.1 - company. As noted earlier, four of the Directors were deleted by the complainant. The complaint was continued against accused nos.3 and 5 on the basis that they were also responsible for and in charge of the management of the accused no.1 - company. In the complaint no specific role was attributed to accused no.5 either in negotiating any agreement with the complainant company / Bank or in signing the lease agreement dated 4th March 1994.. So far as accused no.3 is concerned, it was submitted that the accused no.1 - company had authorised the accused nos.2 and 3 to negotiate with the complainant for leasing of the

machinery. While the complainant's witness PW 1 - Shri Tushar Patel was in the witness box, in his cross-examination deposed,

> "...At the time of lodging of the complaint there were seven Directors of accused no.1 - company.
>
> Q: Who were the non-executive Directors of the accused no.1 - company?
>
> Ans: All the Directors were concerned with the day-to-day affairs of the accused no.1. I do not know as to which of the directors were serving as paid directors of the accused no.1 - Company. It is true to suggest that accused No.8 - Mr. Tushar Pimpale was a whole time director at the relevant time. It is not true to suggest that Dr. Madhusdan Salvi (A-7) and Tushar Pimpale (A-8) were the only Executive Directors of accused no. 1. I have mentioned that accused Nos.2 to 8 were the whole directors of accused no.1 from the record available with the complainant - company. At present I have no documentary evidence to show

that accused Nos.2 to 8 were whole time directors of accused no.1 - company...

"It is true to suggest that the lease agreement (Exh.C-7) was executed at Delhi. I do not know as to who was in charge of the Delhi office of the complainant at the time of execution of agreement. I cannot state as to whether the accused nos.2, 3 and 5 had never visited Delhi office for execution of the agreement"

8. The accused no.2 who was examined as D.W. 1 deposed in his examination-in-chief as under,

"Dr.Tushar Pimpale (accused no.8) was responsible for the conduct of the business of accused no.1-company. He was full time director of the accused no.1 - company. He was fully paid for by accused no.1 - company.

. In his cross-examination he denied to have made a false statement that Dr. Tushar Pimpale accused no. 8 was in-charge of and responsible to the affairs of the accused no.1 - company. He also admitted that the lease agreement at Exhibit C-7 was signed by him. He

further admitted that all the cheques dishonoured were signed by him on behalf of the accused no.1-company.

9. So far as the documentary evidence is concerned the three balance-sheets of the accused no.1 - company as placed on record have also given the names of all the Directors of the accused-company. The balance-sheet for the year 1994-95 gives the following names of the Directors,

(1) Shri Dilip S Dahanukar - Chairman (A-2)

(2) Shri Bharat S. Dahanukar (A-3)

(3) Shri Brijmohan S. Khanna (A-4)

(4) Shri Haresh H. Java (A-5)

(5) Shri Ramdas C. Thakkar (A-6)

(6) Dr.Madhusudan J. Salvi (A-7)

(7) Dr. Tushar D. Pimpale - Whole-time Director (A-8)

(8) Shri Hoshi D. Bhagwagar.

. Resolution at Item No.7 states that Dr.Tushar Pimpale was appointed by the Board of Directors of the Company as an Additional Director and also as a

Whole-time Director of the Company, pursuant to the relevant provisions of the Companies Act, 1956, with effect from 20.12.1995. The Balance-sheet speaks about his remuneration and other perquisites etc. The last Director Shri Hoshi D. Bhagwagar is shown to be the Company Secretary and thus another full time Director. Section 141 of the N.I. Act deals with the offences by companies and sub-section (1) states that if the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The balance-sheet clearly shows that the accused no.2 was the Chairman and accused no.8 was the Whole-time Director and thus both of them were in charge of and were responsible to the company for the conduct of its business. Despite this for the best known reasons the complainant, as noted earlier, sought leave to delete the name of accused no.8. Similarly the other Director Shri Bhagwagar, who was another full time employee and Director of the accused no.1 - company, was not impleaded as an accused.

10. In the case of SMS Pharmaceutical Ltd. Vs. Neeta Bhalla & anr. **[(2005) 8 SCC 89]** the Apex Court has laid down the following guidelines,

> "11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.
>
> 12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position

in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

11. Thus having regards to the evidence adduced before the learned Metropolitan Magistrate, both oral as well as documentary, and by the admitted facts by the witness of the complainant - Bank it is clear that the accused nos.3 and 5 or either of them could not be held to be the persons in-charge of and responsible to the company for the conduct of its business at the time the offence was committed. Even in the complaint or in the evidence brought on record on behalf of the complainant there is not even a word against the accused no.5 to hold him responsible for the conduct of the business of accused no.1 company. As noted earlier, the accused no.3 was claimed to be guilty and has been so claimed in this appeal only on the basis that he was one of the persons authorised to negotiate with the complainant along with the accused no.2. Accused no.1-company passed the Resolution (Exhibit C-5) to negotiate with the complainant authorising accused nos.2 and 3. However, when the lease agreement (Exh.C-7) was signed, it was signed by

accused no.2 alone on behalf of the accused no.1 company. The cheques were signed by accused no.2.

12. The learned Metropolitan Magistrate, therefore, held that there was no evidence to hold that the accused no.3 - Bharat S. Dahanukar and accused no.5 - Haresh H. Java took active part in the management of the affairs of the company at the time of the execution of lease agreement at Exhibit C-7 or subsequent thereto and, therefore, the vicarious liability under Section 141 of the N.I. Act cannot be fastened against them on account of dishonour of the cheques signed by accused no.2 on behalf of the accused no.1 - company.

13. On the powers of the Appellate court while dealing with an appeal against the order of acquittal under Section 378 of Cr.P.C., the Supreme Court recently in the case of State through SPE and CBI, A.P. v. M. Krishna Mohan & anr. **[2007 AIR SCW 7044]** observed,

> "38. It is, however, a trite law that an appellate court, while entertaining an appeal from a judgment of acquittal, would also be

> entitled to consider the evidences brought on record by both the prosecution and the defence and arrive at its own decision. Interference with a judgment of acquittal may not be made when two views are possible to be taken, but when on appraisal thereof, only one view is possible, the appellate court would not hesitate to interfere with the judgment of acquittal. In this case, we are firmly of the view that no two views are possible to be taken."

14. This appeal must, therefore, fail and the same is hereby dismissed.

(B.H.MARL